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SERVICE DATE – JANUARY 2, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS & REFINING, USA, INC.

v.

CSX TRANSPORTATION, INC.

Digest:<sup>1</sup> In this decision, the Board denies the request of defendant CSX Transportation, Inc. for a stay pending judicial review of the Board's decisions finding that the defendant railroad has market dominance over certain of the transportation movements at issue in this proceeding.

Decided: December 31, 2013

Defendant CSX Transportation, Inc. (CSXT) has filed a petition asking the Board to stay, pending judicial review, the decision served in this matter on December 19, 2013 (December 2013 Decision). The December 2013 Decision denied CSXT's request that the agency reconsider its earlier decision, served on May 31, 2013 (May 2013 Decision), finding that the merits of the rate reasonableness analysis in this rate case can move forward because the carrier has market dominance over certain transportation movements that are the subjects of the complaint. CSXT argues that the merits phase of this proceeding should be held in abeyance until after the reviewing court rules on the Board's finding that the carrier has market dominance.<sup>2</sup> TPI filed a reply opposing the stay. For the reasons discussed below, the petition for stay will be denied.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> CSXT has sought review of the December 2013 Decision and the May 2013 Decision in CSX Transportation, Inc. v. STB, No. 13-1313 (D.C. Cir. filed Dec. 26, 2013).

## BACKGROUND

In 2010, Total Petrochemicals & Refining USA, Inc. (TPI) filed a complaint challenging the reasonableness of CSXT's rates for the transportation of polypropylene, polystyrene, polyethylene, styrene, and base chemicals between 104 origin and destination pairs, located primarily in the Midwestern and Southeastern United States. TPI alleged that CSXT had market dominance over the traffic and asked that maximum reasonable rates be prescribed pursuant to the Board's Full Stand-Alone Cost (SAC) test.

Many years ago, the agency routinely handled the market dominance and rate reasonableness phases of a rate case sequentially. Beginning in 1996, the agency established a practice of requiring simultaneous filing of market dominance and merits pleadings. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings, 1 S.T.B. 754, 760 (1996). In certain limited circumstances, however, the Board has permitted bifurcation of the market dominance and rate reasonableness determinations when the defendant railroad has provided evidence raising considerable doubts as to the shipper's ability to satisfy the Board's market dominance standard. See Sierra Pac. Power Co. v. Union Pac. R.R., NOR 42012, slip op. at 4-5 (STB served Jan. 26, 1998).

In a decision served on April 5, 2011, the Board bifurcated the market dominance and the merits aspects of this proceeding after concluding that CSXT demonstrated that there were complicated factual disputes between the parties that raised doubts as to its market dominance over some of the many movements at issue in the proceeding. Ultimately, in the May 2013 Decision, the Board, with Vice Chairman Begeman dissenting, found CSXT market dominant over certain of the traffic lanes and concluded that the rate reasonableness phase should proceed as to those lanes. The Board denied CSXT's request for reconsideration of that ruling in the December 2013 Decision, with Vice Chairman Begeman dissenting. CSXT has challenged these decisions in court and has sought an administrative stay pending judicial review.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 721(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. To obtain a stay, the requesting party must show that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be enjoined, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed by a stay, and (4) the public interest supports the granting of the stay. See Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). Although, as CSXT points out, the application of the four factors is not mechanical, ultimately the party seeking a stay bears the burden of persuasion on all elements required for such extraordinary relief. See Middletown & N.J. R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35412, slip op. at 2 (STB served Oct. 6, 2010); 5 U.S.C. § 556(d).

CSXT has challenged a non-final order. CSXT cannot justify a stay pending judicial review because its request for judicial review of the Board’s market dominance determination is improper at this time. A prerequisite to judicial review of a Board order is that the order be a final one. See 28 U.S.C. § 2342(5) (parties may seek judicial review of “rules, regulations, or final orders of the . . . Board”) (emphasis added). The orders challenged here by CSXT are not final. Unlike a Board finding of no market dominance, a finding of market dominance is an interlocutory, non-final order that permits a rate case to move forward, but does not establish any rights or obligations of any party. See 49 U.S.C. § 10707(b), (c) (a finding that a rail carrier does not have market dominance “is determinative,” while a finding of market dominance simply permits the Board to “then determine [the rate at issue] to be unreasonable if it exceeds a reasonable maximum”); *Ford Motor Co. v. ICC*, 714 F.2d 1157, 1159 (D.C. Cir. 1983) (“Nor does a finding of market dominance establish that a rate is unreasonably high; the finding merely authorizes the [Board] to proceed to an adjudication of the reasonableness of the rate.”). Indeed, in *Aluminum Co. of America v. United States*, 790 F.2d 938 (D.C. Cir. 1986), the court held that a finding of jurisdiction over a rate matter was not appealable as a final agency action even though it required a party to participate in an agency proceeding. There the court noted that the outcome of the rate proceeding could cause a preliminary ruling establishing jurisdiction to “fade into insignificance.” *Id.* at 942. As TPI points out,<sup>3</sup> the same can be said with regard to a market dominance finding here, which simply establishes jurisdiction over the rate case. If the rates are ultimately found reasonable, then the appeal of the market dominance ruling would have been unnecessary; in contrast, if the rates are found unreasonable, the market dominance finding can be challenged at that time. Thus, CSXT’s petition for a stay is defective because it challenges a non-final decision.

Nevertheless, below we address CSXT’s arguments supporting its request for a stay.

CSXT has not supported its claim of irreparable harm in the absence of a stay. CSXT’s principal argument is that CSXT (as well as TPI, and the Board) would be irreparably injured absent a stay. The basis for CSXT’s irreparable harm argument is that rate cases in general, and this one in particular, are complex; and “[g]iven the enormity of the effort and accompanying costs required to prepare and analyze SAC evidence in this case, it would be wasteful and imprudent” to make the parties present their merits evidence before the court rules on the market dominance finding.<sup>4</sup> CSXT characterizes as “irretrievable” the losses that would result from having to participate in merits-based rate litigation.<sup>5</sup>

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<sup>3</sup> TPI Reply 5.

<sup>4</sup> CSXT Petition 4.

<sup>5</sup> *Id.* at 6.

CSXT has not explained how this case is distinguishable from the well-settled precedent that litigation expense, even if substantial and unrecoverable, does not amount to irreparable injury. FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980); see also Salazar v. District of Columbia, 671 F.3d 1258, 1265 (D.C. Cir. 2012) (“cost . . . associated with litigation does not serve to establish irreparable harm”); I.A.M. Nat’l Pension Fund Benefit Plan A v. Cooper Indus., Inc., 789 F.2d 21, 25 (D.C. Cir. 1986) (same). We recognize that SAC cases are complex, and the Board has taken steps to provide more readily available simplified procedures to reduce some of the complexity and cost of rate cases. Most cases, however, have continued to be brought under the complex SAC procedures. Litigating those rate cases, while time-consuming and expensive, is a cost of being a railroad regulated under the Interstate Commerce Act, which expressly provides shippers an opportunity to challenge rates alleged to be unreasonable where there is an absence of effective competition. Therefore, we find that CSXT has not demonstrated irreparable harm.

A stay would harm TPI and would not serve the public interest. CSXT argues that “[a] stay holding this case in abeyance would benefit all parties by [giving the court a chance to review the market dominance findings] before the parties go to the great expense of developing and analyzing three rounds of SAC evidence.”<sup>6</sup> As with its irreparable harm argument, CSXT claims that TPI should want to hold the merits in abeyance pending judicial review of the market dominance findings to avoid the risk that it (TPI) would make filings that could prove “wasteful and imprudent” depending on the court’s ruling on the market dominance finding. CSXT also claims that the public would benefit by abeyance because of the interest of the regulated community in certainty. Finally, CSXT asserts that the Board should want to stay the matter to avoid expending its own resources on the merits prior to review of the threshold market dominance finding.

We do not agree. TPI, the party that CSXT claims would also benefit from a stay, instead opposes a stay. Indeed, TPI states that it has already completed much of the work on its opening case (which is due in just six weeks), and its position is that further delay will harm rather than protect it with respect to matters such as certainty in soliciting business.<sup>7</sup> CSXT has not shown that a stay will not harm TPI.

Regarding harm to the public and the agency, CSXT argues that a remand of one aspect of this (or any other) proceeding could affect the nature of the work done on other aspects of the proceeding. But deciding cases piecemeal so that parties and the agency can avoid “wasteful and imprudent” work that could be unnecessary if a portion of the decision is later set aside

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<sup>6</sup> Id. at 9.

<sup>7</sup> TPI Reply 5-9.

would be a slippery slope. The logic would apply to every rate case, as every market dominance finding is capable of judicial disapproval. Such a result would contravene the will of Congress and the rulings of the courts, which have concluded that, as a general rule, piecemeal litigation is inefficient, and interlocutory review inappropriate. We are of the view that interlocutory review of rate cases (and others) would be inappropriate, given the Congressional directive that review of decisions of lower courts and federal agencies (including the Board) is generally limited to final decisions. See, e.g., 28 U.S.C. §§ 1291, 2342(5).

CSXT points out that we have issued stays pending review in other proceedings. While the Board has on rare occasions granted requests for stays pending review, the circumstances under which it has done so are quite different from those present here. CSXT cites our decision in Stagecoach Group PLC—Acquisition of Control—Twin America, LLC, MCF 21035 (STB served Mar. 9, 2011), for the proposition that a stay is warranted in this case. In Stagecoach, we issued a stay pending resolution of a request for reconsideration by the Board (not the court) because we found potential irreparable injury were the carrier required to unwind a completed transaction while the matter was still pending at the agency. Here, in contrast, there is nothing to unwind and no irreparable injury. In Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Railway, NOR 41185 (STB served Sept. 3, 1997), both parties were protected by and agreed to the stay, whereas here, TPI does not agree. In Western Fuels Ass’n. v. BNSF Railway, NOR 42088 (STB served Jan. 20, 2012), the Board found, and both parties agreed, that intervening events (the likely write-up of BNSF’s assets to reflect its acquisition by Berkshire Hathaway) constituted changed circumstances that warranted maintaining existing rate prescriptions pending completion of a separate proceeding concerning the write-up. In Duke Energy v. Norfolk Southern Railway, 7 S.T.B. 394 (2004), the Board stayed a rate prescription because both sides were expected to make substantial filings that would likely change the relevant numbers, which had already been subjected to various modifications. And in N.Y.C. Economic Development Corp.—Adverse Abandonment—N.Y. Cross-Harbor Railroad in Brooklyn, NY, AB 596 (STB served Aug. 28, 2003), the Board issued a stay pending review because the decision would have permitted a local body to oust an existing carrier, thereby disrupting service to shippers. None of these rationales apply here.

CSXT has not shown that it will likely succeed on the merits. Finally, CSXT argues that it will likely prevail on the merits of a challenge to market dominance, based on “all of the arguments and authority set forth in its prior submissions” in this and other proceedings, which it does not set out but instead “incorporates by reference hereto.”<sup>8</sup> Ultimately, its argument amounts to a claim that: (1) because the Board’s decisions in this proceeding were not unanimous, CSXT’s appeal here presents novel or difficult legal questions; and (2) given its

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<sup>8</sup> CSXT Petition 7 n.5.

“showing of risk of irreparable harm to both parties and the public and the lack of harm to TPI from a stay,”<sup>9</sup> the Board should grant a stay.

As we have noted, CSXT will not prevail on the merits (of the market dominance ruling) because the December 2013 Decision and the May 2013 Decision are not final. But, in any event, the Board has addressed thoroughly CSXT’s merits arguments on the issue of market dominance set forth in CSXT’s prior submissions in both this proceeding and the other proceeding cited by CSXT.<sup>10</sup> CSXT has raised no new arguments on the merits here. While some Board decisions are not unanimous and aspects of many Board decisions involve novel or difficult legal questions, we do not break them apart for piecemeal, interlocutory litigation, nor do the courts do so in their review roles.

### CONCLUSION

CSXT’s request for a stay pending judicial review will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CSXT’s motion for a stay pending judicial review is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Vice Chairman Begeman dissented with a separate expression.

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VICE CHAIRMAN BEGEMAN, dissenting:

As I explained in my prior two dissents on the market dominance portion of this rate proceeding, I have serious concerns over the Board’s new limit price approach to determine market dominance and whether a rate can be challenged.

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<sup>9</sup> Id. at 7.

<sup>10</sup> As with CSXT’s petition, the Board incorporates by reference its previous statements on these issues into this decision.

The matter before us has far reaching ramifications well beyond this case. As CSXT points out in its stay petition, considerable time and resources for both the parties and the Board are at stake. Other cases are pending at the agency that could also be greatly impacted if the court overturns the majority's limit price methodology. All parties—shippers and carriers, current and future litigants alike—deserve to know whether the methodology the Board is now using to determine market dominance will be upheld or whether another approach will be required. This matter is already pending judicial review and it would be in the public interest for this controversy to be concluded sooner than later. In the meantime, we should act to curtail expending the parties' and the Board's time and resources to the extent practicable.

While today's decision argues that, "interlocutory review of rate cases (and others) would be inappropriate," this same Board rightly opened the door to review of the limit price methodology in M&G Polymers v. CSXT, NOR 42123 (STB served Sept. 27, 2012). There, the Board provided an opportunity for public comment on the new approach before it became final. Specifically, the Board requested that "[i]f there is a better general approach to this issue, if there is a superior benchmark that can be used to guide this inquiry, or if the application of the refined approach to the facts of this case is somehow flawed, parties are strongly encouraged to use this comment period to bring such concerns to our attention."

M&G settled before the Board issued a final decision, and the Board did not have to address any of the resoundingly critical comments. In this case, the Board, against my objections, rejected the comments in their entirety without any compensation for the limit price methodology's shortcomings. Given that the Board allowed a comment period on the limit price approach in the previous case but not here, and that case settled without the Board acting on those comments, the majority's stance against interlocutory review here seems inconsistent.

I continue to urge the Board to establish a rulemaking to develop a more economically sound methodology to determine market dominance, instead of merely pushing the limit price scheme forward in its current form and dismissing the serious criticisms filed about the approach in a prior docket. I must dissent from the Board's decision.